Environmental, Social, and Governance Law and Practice Overview

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Free webinar

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Royal Commission, *Final Report*, p 321

Thank you for inviting me to participate today and to give this helter-skelter overview of what is otherwise quite a dense and far-ranging topic. But those who will have access to the slides later can read them at their leisure and follow the PowerPoint links as well.

Introduction to the 'Black Summer': an 'unprecedented' 'natural' disaster

Namadji National Park, ACT, April 2020


NSW/Victorian Border, May 2020

Mogo Town Centre, regional NSW, May 2020

Photos © D. Hogan-Doran 2020

So, 2020 feels some time ago now. I think everyone's sense of time has really lost touch with reality over the last few years, but I'm taking you back to just a quick scamper through the Black Summer 2019/2020, in which Australia experienced what was said to be an 'unprecedented' 'natural' disaster.

These are some of the photographs that I took when I went down through the devastated South Coast of New South Wales to interview witnesses for the Royal Commission.

'Compounding' disasters: a summer with devastating hailstorms
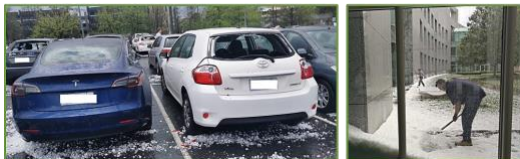
Hail storm damage, Canberra, January 2020

Royal Commission, *Final Report*, p 472

'Compounding disasters may be caused by multiple disasters happening simultaneously, or one after another. Some may involve multiple hazards – fires, floods, and storms.'

Royal Commission, *Final Report,* [24]

One of the things that we saw in the Royal Commission and are seeing across the world now is the occurrence, and increasing frequency of disasters, is that we see them compounding disasters, where

there are multiple hazards, maybe fires, floods, and storms, and them happening either simultaneously or one after the other.

'Cascading' effects: a summer also with devastating flooding

Town flooding, Jandowae, Queensland, February 2020

Royal Commission, *Final Report*, p 407

'Some have cascading effects – threatening not only lives and homes, but also the nation's economy, critical infrastructure and essential services, such as our electricity, telecommunications and water supply, and our roads, railways and airports.'

Royal Commission, *Final Report,* [24]

But we're also seeing them having cascading effects. So they not only threaten lives and property, but they also threaten the economy, infrastructure, essential services, transport, communications, supply: they have these societal effects. These are critical for those who are assessing investments, for example, in infrastructure assets, in communities, in particular locales, to be thinking more broadly and more deeply about the kind of issues that need to be taken into consideration in undertaking that risk assessment, and then moving through the risk mitigation and adaptation proposals.

And then ... a global pandemic
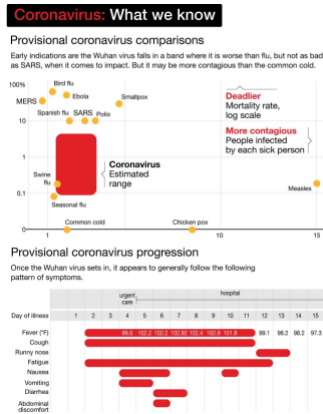
26 February 2020
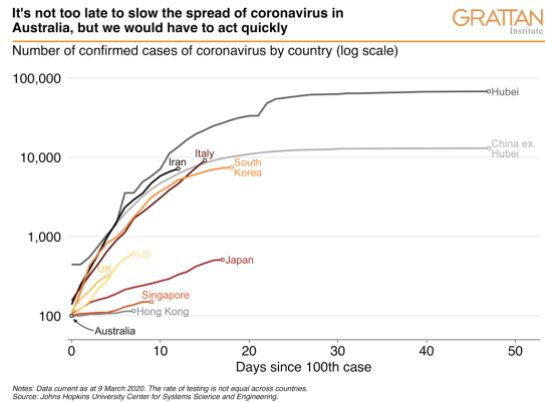
9 March 2020

And of course, then we had a global pandemic, and we still continue to live through that.

Australia's Royal Commission into National Natural Disaster Arrangements

Broad terms of reference, directed to examine, among other things:

- responsibilities of, and coordination between, Australian, state, territory and local governments relating to natural disasters.
- arrangements for improving resilience and adapting to changing climatic conditions.
- what actions should be taken to mitigate the impacts of natural disasters.
- whether changes needed to legal framework for involvement of Australian Government in responding to national emergencies.

Commissioners directed to make any recommendations they considered appropriate, including recommendations about any policy, legislative, administrative or structural reforms.

naturaldisaster.royalcommission.gov.au

So the Royal Commission was commissioned. It's a distinctly Australian and the common law world model of executive government obtaining expert assistance, in very focused terms to give independent, impartial advice to government. And when done well and when harnessed well, it can provide really significant policy impetus and a real call for change.

This particular Royal Commission was not into climate change *per se*, and was formally directed to national natural disaster arrangements, but necessarily looked at Australia's changing climate and looked at how adaptation and mitigation issues were going to be addressed and implemented. And part of that was looking at the legal frameworks as to their adequacy and to how they ought to changed.

Part I: Natural Disaster Risk
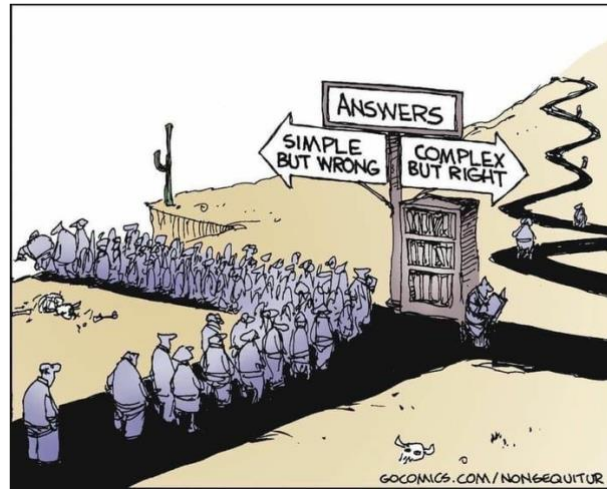
Now, the critical thing I want to try to do today is just to give you a bit of a feeling for the language and the issues, to try to translate them for you, and to give some framing for how you could consider the greater complexity that there is in 'E' 'S' & 'G' in circumstances of disaster. Because when one is assessing risk, in terms of natural disasters, one is assessing environmental risk, social risks, governance risks. And there may be some glib answers to be given, but unfortunately it's usually the complex but right answer is the one that you're looking for.

## Disaster risk fundamentals: natural hazards and 'natural' disasters

Category	Type of hazard
Geophyiscal	Earthquakes
Meterological	Cyclones, Severe Storms
Hydrological	Floods
Climatological	Bushfires

"Natural hazards on their own are not disasters – they are merely earth systems in operation. Disaster occurs when natural hazards intersect with people and things of value, and when impacts of hazards exceed our ability to avoid, cope or recover from them."
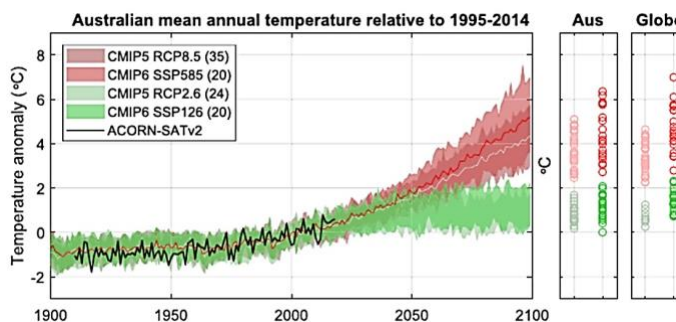
Royal Commission, *Final Report*, [2.59]

So, starting with disaster risk fundamentals, the first is to understand the difference between natural hazards and so-called natural disasters. Natural hazards themselves are not the disaster. They're just earth systems in operation. But the disaster occurs when they impact or intersect with people and things we value, infrastructure, communities and so on. And we can't cope with that.

Climate-driven natural hazards have already increased and are intensifying
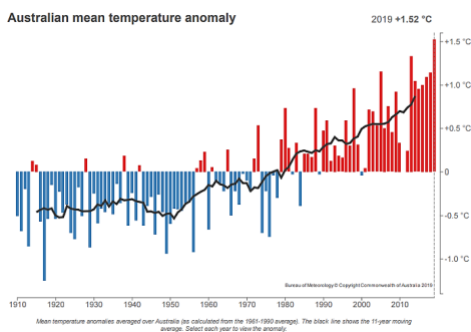
Australian mean temperature anomaly, 1910-2019

Projected change in average temperature in Australia using CMIP5 and CMIP6 across 'low' (green) and 'high' (red) greenhouse gas emission scenarios.

Source: Bureau of Meteorology, CSIRO
Royal Commission, *Final Report*, pp 58, 61

Briony was talking about the increase in climate change litigation, and it is entirely premised on what we are seeing in terms of climate-driven natural hazards increasing and intensifying.

Climate-driven natural hazards expected to become more frequent & intense
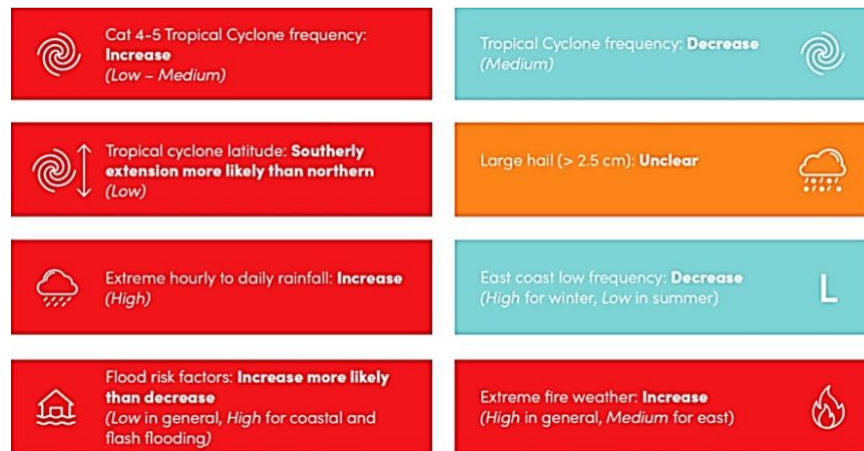
Projected changes in climate-driven natural hazards (confidence estimates in brackets)

Source: Climate Measurement Standards Initiative, 2020
Royal Commission, *Final Report*, p 60

And we're seeing that particularly not just in fire weather, but also in terms of cyclone intensity and storms and hail storms and flooding as a consequence.
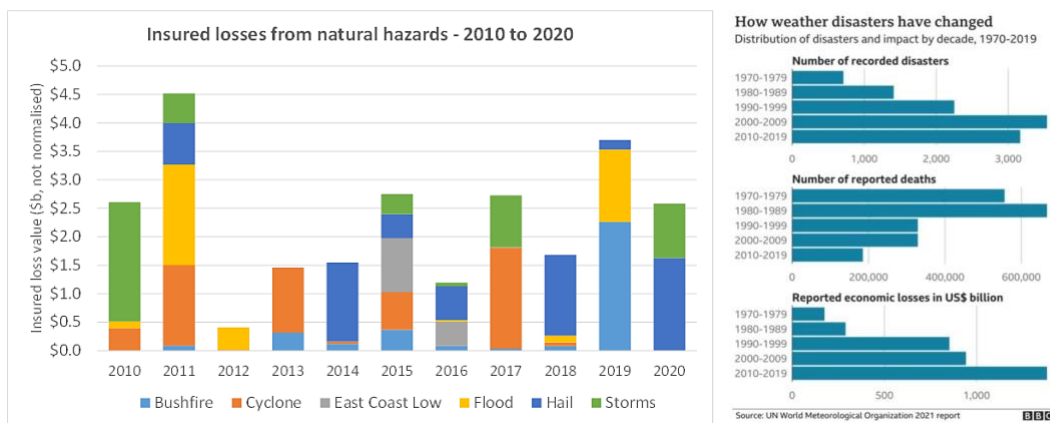
Royal Commission, *Final Report*, p 68.

Individuals & natural hazards impact: insured losses mounting

And we're seeing significant increases in insurance losses because those hazards are impacting on areas of urbanisation or agriculture.

But if you just pause for one moment, one of the things that often strikes people when they go to review a recent disaster is they point to how few people were killed. And that is true. One of the things you see,

particularly in Western nations, not so much throughout all of Asia and other areas of the world, but there has been a marked improvement in saving lives. But the economic losses are really mounting, and the near misses of substantial or significant deaths and injury to humans, can't be overlooked. And the world that we are looking at will increasingly mean those risks come back to us.

Disaster risk fundamentals: exposure and vulnerability

Elements of disaster risk associated with natural hazards

Royal Commission, *Final Report*, p 60

So when we talk about disaster risk, we've spoken about natural hazards, but also there are the 'exposure' and the 'vulnerability'.

To what extent is a community, our people, building stock, infrastructure exposed to that hazard risk, and to what extent are they all vulnerable to being impacted adversely? So that's the kind of language that you will see in the literature and in international instruments, such as the *Sendai Framework* on Disaster Risk Reduction. Those are the components of the language that you will see in the way that risk is identified, treated, and mitigated. Identifying the hazards, considering the exposure to that hazard, and then how vulnerable is the community, the building stock, the wildlife, and the ecosystems?

And then you see around it, that kind of, just harking back to some of Matthew's introduction, in terms of there being a never-ending process, often overlapping, of needing to prepare, to respond, to recover, to mitigate. And what we have seen through all the studies is that huge amounts of money are spent on recovery and not enough on mitigating and trying to stop it or mitigate or reduce the risk to natural disaster impacts.

Disaster risk fundamentals: interdependency and systemic risk

Royal Commission, *Final Report*, p 228
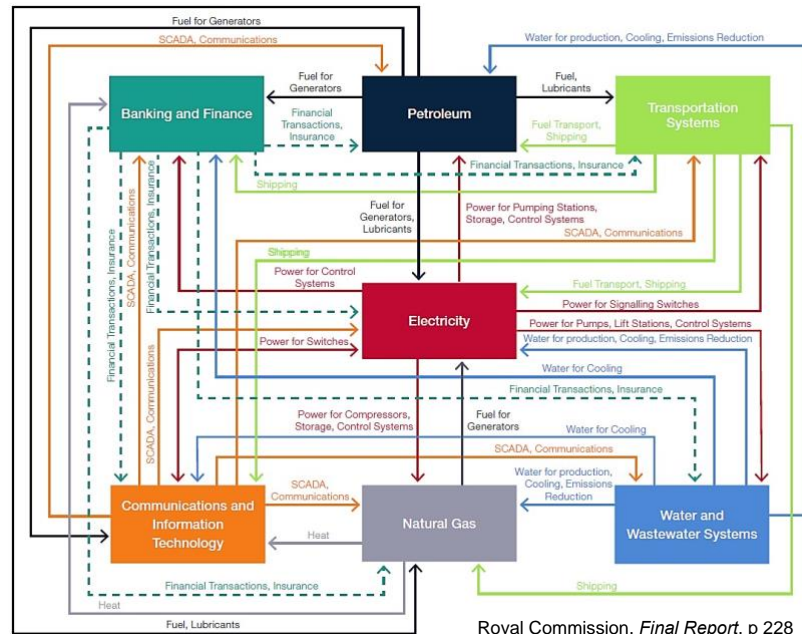
I just wanted to raise this as an example, that it's important to understand that in highly urbanised environments, the interdependency of, for example, this one's just taken electricity as your beginning point, the interdependencies with other aspects of the financial system or the social human systems and how they need to be all taken into account when one comes to identify and assess systemic risks.

Part II: Disaster Laws and Governance

- Complex set of governance arrangements guide risk resilience, disaster policy, and security policy.

- Responsibilities for disaster risk management & climate adaptation mainly rest within emergency management organisations.

- Outcomes at local level often influenced & driven by investment & operational decisions made by others (asset owners & service providers at other government levels & within private companies).

- Strategic and operational decision makers may not have the right tools or data to make informed decisions.

- Strategic, whole-of-system perspective is not defined and embedded through national, state and territory and local levels.
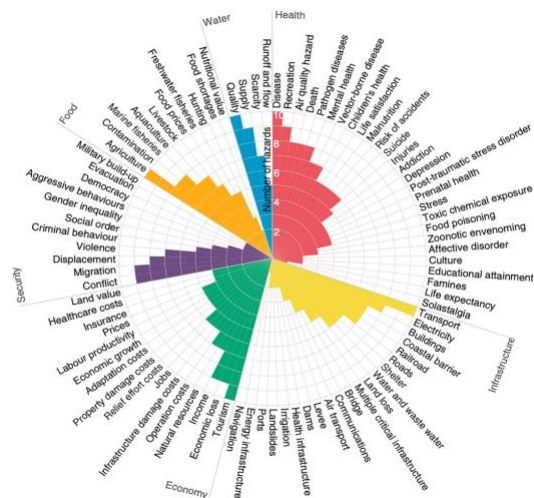
All right, now to the meat of it. Disaster laws and governance, these observations largely will be capable of being applied to any nation, to differing levels of complexity. But you will often see, and this is certainly true of Australia, that there are a complex set of governance arrangements which are guiding

the risk resilience, disaster policy, and security policy. But you'll often see that the responsibilities for disaster risk management and climate adaptation are resting within emergency management organisations, because they're the ones who are primarily geared to climate disasters and other kinds of disasters. And are they necessarily the right organisation to be the lead or to be where that information and that knowledge is embedded?

The outcomes at local levels are influenced often by investment and operational decisions made by others. Asset owners, if you think about telecommunications organisations, electricity organisations, they make their decisions as to how resilient their infrastructure is. And if it's not, then the local community is impacted - but they had no capacity to influence that decision.

Strategic and operational decision makers often just don't have enough information or data to make informed decisions, and there isn't a whole-of-system perspective. There's a siloed, 'this is my responsibility, I'm not thinking about what somebody else's responsibility is in the next department, in the next community, in the next state, in the next country'.

So one of the themes that ran through the Royal Commission was the extent to which there were problems across borders. Now that's something that's capable of being a problem in other regions. If you think about South Pacific and Southeast Asia. Transborder issues, issues of disasters on one side of the border are affecting those on the other, the real risk of forced migration because of disasters. These are all kinds of problems that need to be better defined.

Royal Commission, *Final Report*, p 113

Now, I asked Matthew to pick some slides for me to speak about, and he didn't want me to talk about this slide - I've got a little cross beside it, but I just wanted to give you an explanation of why it was relevant. If you are investing, for example, or if your organisation is an organisation that has to make decisions which affect or respond to the risk of natural disaster. And when I say natural disaster, no disaster is 'natural' because it's natural hazards that have caused the disaster. But these are the kinds of information input that you will need in your due diligence to understand that risk exposure and understand to what extent there is going to be value left in your organisation, or exposure for liability and damages.

So what is your hazard information? What is the exposure information that you have, your vulnerability information, the operational response information, and disaster impact information?

So within the body of work done by the Royal Commission, which was very substantial, but in a very short period of time, and all of the material is available on the internet still, every one of these boxes has something of some value that will respond to it.

The Royal Commission into National Natural Disaster Arrangements Report

'Australia's disaster outlook is alarming'

Royal Commission, *Final Report,* p 68

Insights gained from, and conclusions driven by, the scientific evidence

Report clearly signals *urgent* need to improve disaster management capacity, resilience & adaptation as natural hazard events become more frequent & severe under climate change.

Requires a *'fundamental shift in strategic thinking'* about national natural disaster risk management.

Expert reactions from the scientific community to Royal Commission report
'Overall, this seems a realistic report that incorporates a diverse and complex body of evidence'
- Professor Bowman, Professor of Pyrogeography & Fire Science, University of Tasmania

'It's an extraordinary read … they go across an extraordinary breadth.'
- Dr Annagretta Hunter, Australian National University

'calls for strategic imagination'

So the Report itself. There were three Commissioners who were supported by a big team of Counsel and solicitors and policy analysts.

The primary finding of the Commissioners was that Australia's disaster outlook 'is alarming'. Now one doesn't tend to see language of that kind in government reports, which I think gives you some indication as to how much they were impressed by the urgency of their task, and why their recommendations needed to be directed as they were. What they saw as fundamental was a need for a fundamental shift in strategic thinking, in thinking about national natural disaster risk management.

As I'm about to show, all of it was based on the scientific evidence that was presented to them. I called a range of witnesses from the Bureau of Meteorology, CSIRO, a very wide range of experts. And that foundation really in a sense compelled the conclusions that the Commissioners came to.
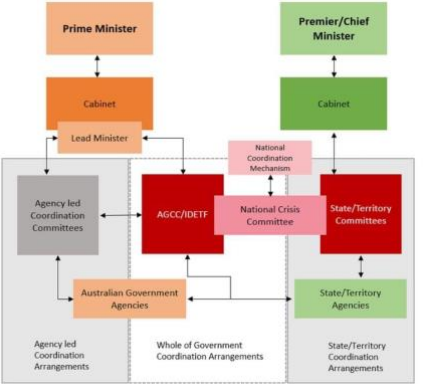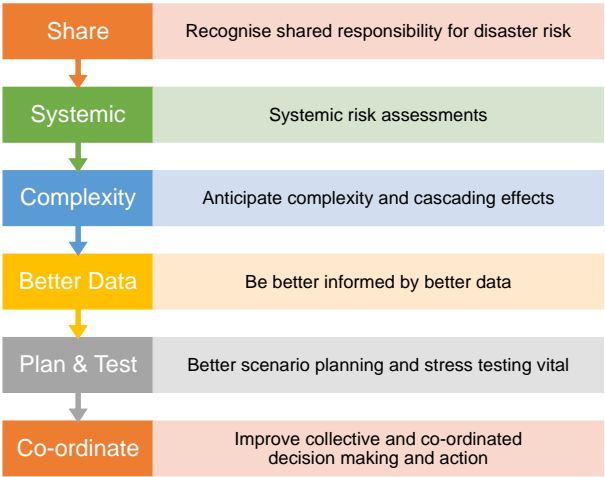
Started 20 February 2020

A clear role for governments

Disasters have changed
- Compounding disasters

We need to act on multiple fronts

We need a national approach
- Shared responsibility
- More cooperation and coordination
- Accountability and assurance mechanisms

Published 30 October 2020

Greater role for Australian government
- Declaration of national emergency

We need strategic leadership directed at resilience
- Senior ministerial leadership across the nation
- Standing national resilience & recovery entity
- Standing national emergency management entity

Sharing people and resources

Report Overview:

National picture needs national data

Supporting individuals to make good decisions
- Community education
- Inconsistencies in warnings, danger ratings, and other information
- Unclear information about land management
- In the dark about risk exposure

Whole-of-nation effort required

> "*Unprecedented is not a reason to be unprepared. We need to be prepared for the future.*"
> Air Chief Marshall Mark Binskin AC (Ret'd), Chair's Foreword, Royal Commission, *Final Report*, p 7

I'm literally, from this slide, picking up the headlines in their Overview chapter. These are their words. What is necessary is there to be a 'clear role for governments'. Disasters 'have changed', and there are 'compounding disasters'. Need for 'national approach' and 'strategic leadership directed at resilience', and a 'whole-of-nation effort'.

And one of the things I started, one of my early slides was talking about this being an unprecedented natural disaster. Even if it was unprecedented, and there are those that say it was not, it certainly was not unexpected, it's not a reason to be unprepared and we need to be prepared.

Improving national disaster risk governance

Share	Recognise shared responsibility for disaster risk
Systemic	Systemic risk assessments
Complexity	Anticipate complexity and cascading effects
Better Data	Be better informed by better data
Plan & Test	Better scenario planning and stress testing vital
Co-ordinate	Improve collective and co-ordinated decision making and action

Australia's National Crisis Coordination Arrangements 2020 (post bushfires, during pandemic)

Royal Commission, *Final Report*, p 80

So this slide, I think, really is one that is capable of being taken up by other countries, those particularly

within the region and even within regional levels. And it's about identifying ways in which to improve disaster risk governance. Now, when we talk about governance, we're talking about ways in which information, people with different responsibilities and how they respond to events, how they all operate with each other, on what basis do they operate, and how do they respond? There's probably a better definition of that but you can read the Report.

So the key points here are that each one of these is something that was taken up through the Royal Commission's report. The recognition of the disaster risk responsibility is a shared responsibility, which means that all elements of government, but also industry, communities, and individuals all have a shared responsibility.

But in saying that, it's not the same as saying that everyone has an equal responsibility. And a lot of the times, someone's ability to discharge that responsibility depends on another player in the system. So to the extent that individuals, that homeowners, members of communities can prepare themselves for disaster, depends on the extent to which they're informed of their risk exposure.

The need for systemic risk assessments to understand this complexity, to be better informed, and to scenario plan and stress test, and to have better decision making are all running themes that can be and ought to be taken up.

And one of the things, if you can just see, just checking my time, you can just see Australia's Crisis Coordination Arrangements. There's a lot of this [crossed arms in an X and pointed fingers away] going on really. It looks neat, but there's a lot of that going on.
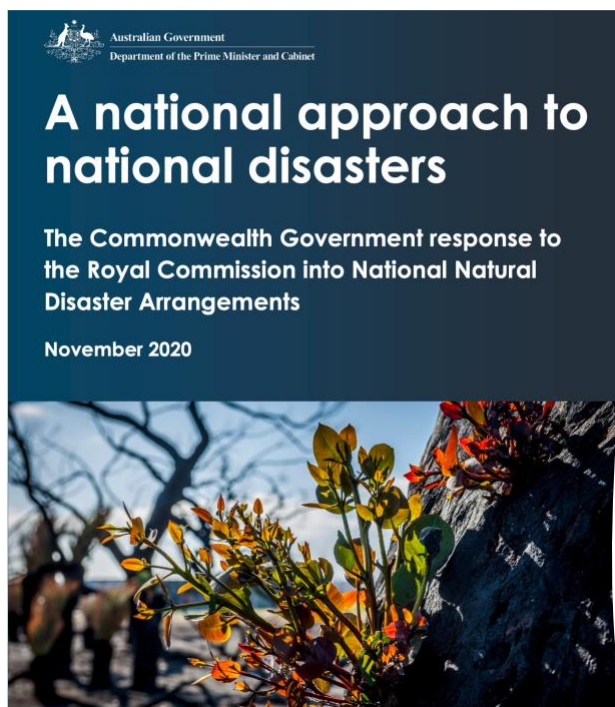
Highlights of Australian Government Response:

- New laws: National Emergency Declaration

- New National Recovery & Resilience Agency
  recovery.gov.au

- New Australian Climate Service
  www.acs.gov.au

- New Natural Hazards Research Australia
  www.naturalhazards.com.au

- Changes to speed up Australian Defence Force engagement in emergency relief

So the Australian government, the federal government response to the Royal Commission was directed at national, the nationally focused recommendations which were purely to them. The principal change was rushed through the Australian parliament in late 2020, which was to introduce a National Emergency Declaration law. And it's since been triggered for the floods that have been in northern New South Wales and southeast Queensland. I don't think they ended up triggering it for Queensland. There was establishing of a new National Recovery and Resilience Agency. A new Australian Climate Service.

And one of the things the Climate Service will do is undertake more work on Australia's climate projections and downscaling of models to provide better information and insights for more regional exposure.

The new Natural Hazards Research Australia, which I've just recently been appointed to as a director, which has been funded with about $85 million in funding to partner with universities, industry, philanthropic organisations, to improve Australia's research into natural hazards [and disaster risk reduction].

And also improvement on the ability to use the Australian Defence Force. Because we don't have a civil defence organisation and primarily rely on the ADF to do the extra work now.

ALL HAZARDS
HIGH RISK PROPERTIES AS PERCENTAGE OF ALL ADDRESSES, (HRP%) IN 2100

0% 50%
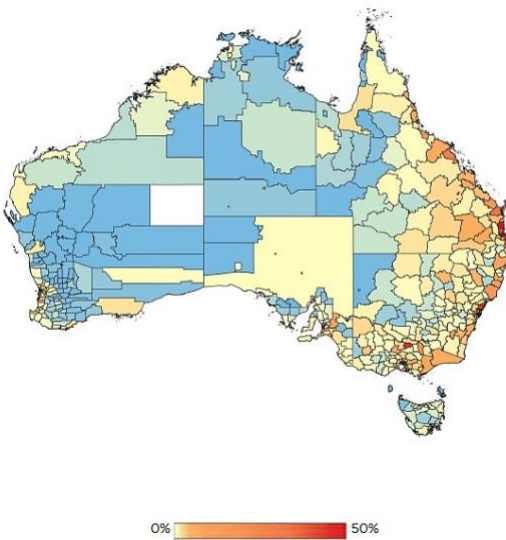
Royal Commission, *Final Report*, p 402

Example recommendations

Land use planning laws: promoting resilience and adaptation to disasters

Recommendation 19.1

Communication of natural hazard risk information to individuals
State and territory governments should each have a process or mechanism in place to communicate natural hazard risk information to households (including prospective purchasers) in 'hazard prone' areas, and work together, and with the Australian Government where appropriate, to explore the development of a national mechanism to do the same

Recommendation 19.3

Mandatory consideration of natural disaster risk in land-use planning decisions
State, territory and local governments should be required to consider present and future natural disaster risk when making land-use planning decisions for new developments.

Just pausing my last three slides. There were many recommendations - there were 80 recommendations in the Report. Some of them are more consequential and some of them have been demonstrated to be borne out by more recent events.

So for example, these ones on land use planning talk about communicating the risk to individuals and to make it mandatory to communicate natural hazard risk information to those living in hazard prone areas. For example, if you are going to buy into an area, if you're buying into the Hawkesbury floodplain, do you appreciate, are you being told as a purchaser that you are buying into a flood plain, and these are the risks that you will have? And the requirement to take into account natural disaster risk when making land use planning decisions. We'll see if these recommendations get taken up by state governments.

Disaster laws & governance: checklists

- Building and construction
- Civil liability
- Climate change adaptation and mitigation
- Criminal law
- Disaster risk management
- Education
- Emergency response/civil defence
- Environmental impact assessments
- Environmental management and protection
- Forest management
- Health
- Human rights
- Insurance
- Land use planning
- Natural resource management
- Social welfare
- Specific hazards
- Taxation
- Urban development planning
- Water resource management

1. Do you have a dedicated law for disaster risk management that prioritises risk reduction and is tailored to your country context?
2. Do your laws establish clear roles and responsibilities related to risk reduction for all relevant institutions from national to local level?
3. Do your key sectoral laws incorporate provisions to increase safety and reduce vulnerability?
4. Do your laws ensure that sufficient resources are budgeted for disaster risk reduction?
5. Do your laws establish clear procedures and responsibilities for risk assessments and ensure risk information is considered in development processes?
6. Do your laws establish clear procedures and responsibilities for early warning?
7. Do your laws require education, training and awareness-raising to promote a whole of society approach to disaster risk reduction?
8. Do your laws ensure the engagement of civil society, the private sector, scientific institutions and communities in risk reduction decisions and activities?
9. Do your laws adequately address gender considerations and the special needs of particularly vulnerable categories of persons?
10. Do your laws include adequate mechanisms to ensure that responsibilities are fulfilled and rights are protected?

International Federation of Red Cross and Red Crescent Societies, 2015

All right, disaster laws and governance checklists. Two here that I leave you with. I made a presentation to Australian solicitors last year, the government solicitors, and I knew that many people consider themselves, well, if they work in an emergency management organisation, Fire, Rescue, the SES, some sort of organisation like that, they of course think, 'oh yes, I do disaster law'. But the reality of disaster law, because as I've shown to you about that triangle of hazard risk, exposure, and vulnerability, is that there is a disaster law in every component of every lawyer's work. Somewhere there, there is something that will be affected by disaster risk and disaster impact. And if one just takes a look through that long list of dot points from building and construction through to water resource management, you can see how, if you stopped and thought there's something there, in fact, there's more likely to be not just one thing.

And then the other is this list. It's a little bit hard to see, but it's from the Red Cross, which is directed to every nation, and every region with every nation, and every state with every nation, every province, and really every town, every community, to do a checklist, your own due diligence. For leaders to do their due diligence, for the lawyers informing them to do their due diligence. Do we have the laws that we need? Do they allocate roles and responsibilities and accountabilities? Do they acknowledge that there are issues of safety and vulnerability? Are we looking at budgeting in a way that supports these initiatives? Do you have clear procedures for risk assessment and for risk information to be shared? Do you have clear procedures and responsibilities for warning people of their risk? What about education, training and awareness? What about engagement with civil society in the private sector and scientific institutions and communities? And what about thinking about special needs of special groups?

Finally, do your laws have adequate mechanisms to ensure that responsibilities are fulfilled and rights are protected? And I was reflecting, as Briony was speaking, that a lot of the reason there's court litigation, is because it's a direct means to force change. That's what ultimately happens if there's considered to be an insufficiency of action by government or by parliament or implementation of policies that have been announced. And so we'll continue to see that be a mechanism that is utilised until this appreciation of this complexity is taken up within government.

And I've left a little primer list for you to follow up:

Disaster laws and governance: resources

International resources:

- United Nations Office for Disaster Risk Reduction www.undrr.org/building-risk-knowledge www.preventionweb.net

- International Disaster Law Project disasterlaw.sssup.it

- International Federation of Red Cross & Red Crescent Societies - Disaster Law Database www.ifrc.org/en/publications-and-reports/idrl-database/

Australian resources:

- Australian Institute for Disaster Resilience Knowledge Hub www.knowledge.aidr.org.au/disasters/

- Natural Hazards Research Australia www.naturalhazards.com.au

- Australian Emergency Management Library www.knowledge.aidr.org.au/collections/emergency-management-library/

- Royal Commission into National Natural Disaster Arrangements naturaldisaster.royalcommission.gov.au/document-library

- Bushfires and Natural Hazards Co-operative Research Centre - Inquiries & Reviews Database (1886-2020) https://tools.bnhcrc.com.au/ddr/home